Court denied, without opinion, a Petition for Hearing of the said Order of the California Court of Appeal.

## JURISDICTION

The jurisdiction of this Court is invoked on the ground that the California Business and Professions Code section 25601 has been sustained against a claim of unconstitutionality under the federal Constitution.

(i) Appellant was charged with a violation of California Business and Professions Code section 25601, which prohibits the keeping of "any disorderly house or place . . . to which people resort for purposes which are injurious to the public morals . . . . " Said charge was used as a basis for the revocation of petitioner's "on sale" beer license.

(ii) The revocation of petitioner's license was affirmed by the Alcoholic Beverage Control Appeals Board; his petition for writ of review was denied by the Court of Appeal on December 17, 1969; and his petition for a hearing before the California Supreme Court was denied on January 14, 1970.

(iii) Jurisdiction of this Court is conferred by Title 28, United States Code, section 1257(2).

(iv) Cases which sustain jurisdiction are: *Champlin Ref. Co. v. Corporation Comm'n*, 286 U.S. 210 (1943); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939); *Connally v. General Constr. Co.*, 269 U.S. 385 (1926); *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966); *Morey v. Doud*, 354 U.S. 457 (1957); *Douglas v. California*, 372 U.S. 353 (1963); *Stirone v. United States*, 361 U.S. 212 (1960).

## STATUTES INVOLVED

**California Business and Professions Code section 23090.3:**

"The findings and conclusions of the department on questions of fact are conclusive and final and are not subject to review. Such questions of fact shall include ultimate facts and the findings and conclusions of the department."

**California Business and Professions Code section 23090.5:**

(Denies jurisdiction to the Superior Court to)

". . . review, affirm, reverse, correct, or annul any order or decision of the department or to suspend, stay, or delay the operation or execution thereof or to restrain, enjoin, or interfere with the department in the performance of its duty . . . ."

**California Business and Professions Code section 25601:**

"Every licensee, or agent or employee of a licensee, who keeps, permits to be used, or suffers to be used, in conjunction with a licensed premises, any disorderly house or place in which people abide or to which people resort, to the disturbance of the neighborhood, or in which people abide or to which people resort for purposes which are injurious to the public morals, health, convenience, or safety, is guilty of a misdemeanor."

**California Government Code section 11518:**

(The decision of the administrative agency)

". . . shall be in writing and shall contain findings of fact, a determination of the issues presented and the penalty, if any."

## QUESTIONS PRESENTED

I. Whether California Business and Professions Code section 25601, as applied, violates the Fifth and Fourteenth Amendments' guarantee of due process, because of vagueness.

II. Whether California Business and Professions Code section 25601, as applied, violates the First and Fourteenth Amendments, in that it unconstitutionally impresses an individual licensee to infringe his customers' rights of free speech and association.

III. Whether the failure of the Department of Alcoholic Beverage Control to meet any of the issues presented by the petitioner at his license revocation hearing constituted a violation of due process, in that it denied petitioner his right to a fair hearing.

## STATEMENT OF THE CASE

The Department of Alcoholic Beverage Control charged that cause for disciplinary action against petitioner had been established because of purported violation of Business and Professions Code section 25601. In effect, the accusation charged was that homosexuals frequented petitioner's bar and that, on different occasions, clients of petitioner's bar "propositioned" Sheriff's Deputies to commit certain sexual acts repugnant to most Sheriff's Deputies. The solicitations were without the knowledge of the petitioner/licensee, and evidence was offered by the petitioner tending to show that his premises did not disturb the neighborhood.

A second ground (although not clearly separate) was that petitioner was "uncooperative" with the police and, therefore, not a fit person to hold a license, because, according to the police, he resisted a wrongful arrest. This was denied by the petitioner.

No findings were made by the department hearing examiner with respect to the defenses raised by the petitioner, which were, *inter alia*:

1. That section 25601 of the Business and Professions Code was unconstitutionally vague and in violation of the Fourteenth Amendment of the United States Constitution.

2. That in the absence of a showing of knowledge, a licensee cannot be punished for permitting something which the police themselves cannot control, especially where the licensee does everything he can to keep an orderly premises.

3. That the finding of the hearing examiner insofar as the solicitations of the patrons were concerned was supported entirely on hearsay evidence, and received over objection. This was in clear violation of Government Code section 11513(c).

4. That the failure to "cooperate" is not a cause for removing a license, nor does it impute any moral turpitude.

5. That the failure to make findings as required by section 11518 of the Government Code was jurisdictional and no action by the Board could be had without such findings.

In addition, the very real issue had been raised at the Court of Appeal level that Business and Professions Code section 23090 is not only unconstitutional in violation of Article VI, section 10, of the California Constitution, in that it interferes with the constitutionally given power of the Superior Court on writs of mandamus, prohibition and certiorari to be courts

of original jurisdiction, but it also violates Article I, section 21, of the California Constitution, in that said legislation is special legislation granting special privileges and immunities to the Department of Alcoholic Beverage Control, immunizing them and the Appeals Board from any real judicial review, and thus, this licensee, under the Alcoholic Beverage Control Act, is effectively deprived of equal protections and due process of law, in violation of the Fourteenth Amendment of the United States Constitution.

By refusing to consider the judgment of the Alcoholic Beverage Control Appeals Board, the California Supreme Court has decided against petitioner's attacks on the statute. It has, in effect, held that the federal constitutional attack raised by petitioner has no merit; and, therefore, an appeal lies to this Court.

## SUBSTANTIALITY OF THE QUESTIONS

The Department of Alcoholic Beverage Control regulates all sales of alcoholic beverages in California, our most populous state. The effect of a suspension or revocation of a license may be very serious but, at its most minimal, is a denial of property, which must be accompanied by due process of law. The practice of the Department, pursuant to section 25601 of the Business and Professions Code, of threatening a revocation of a license for not maintaining an establishment which comports with "public morality," points up grave First Amendment issues. When, as here, violations of "public morality" can be established by the mere speech of the customers in a licensee's bar, and where the Department requires the licensee, under threat of revocation, to somehow stop

these "abuses," it is clear that a serious and insidious potentiality is created for the suppression of free speech by private individuals under the covert compulsion of a governmental agency.

Furthermore, section 25601 of the Business and Professions Code is unconstitutionally vague, in that it permits revocation of licenses if it is shown that the licensee's establishment is one to which people resort for purposes which are injurious to the "public morals." It is clear that such an amorphous standard not only makes it impossible for a licensee to know how to regulate his establishment but it also permits the Department of Alcoholic Beverage Control to act in an arbitrary and capricious fashion by setting itself up as the ultimate arbiter and interpreter of public morals.

## ARGUMENT

### I

### California Business And Professions Code Section 25601 Is Void For Vagueness, Since A Man Of Ordinary Intelligence Could Not Govern His Conduct In Such A Way As To Avoid Prosecution Merely By Reading The Statute.

The test is whether the statute is couched in "words and phrases . . . so vague and indefinite that any penalty prescribed for [its] violation constitutes a denial of due process of law" *Champlin Ref. Co. v. Corporation Comm'n, supra,* 286 U.S. 210, 243. On its face and as applied, section 25601 of the Business and Professions Code contains that fatal deficiency.

This Court has insisted that every sanction that is penal in nature must adequately inform those who might come within its purview of the conduct that is proscribed with such sufficient particularity that they might be able to guide their conduct thereby. *Lanzetta v. New Jersey, supra,* 306 U.S. 451; *Connally v. General Constr. Co., supra,* 269 U.S. 385. Statutes must also provide a certain standard for the determination of guilt. *Giaccio v. Pennsylvania, supra,* 382 U.S. 399.

Section 25601 of the Business and Professions Code states that a licensee is subject to disciplinary action if his establishment is a " . . . place in which people abide or to which people resort . . . *for purposes which are injurious to the public morals* . . . . " (emphasis added). It is submitted that the term "injurious to the public morals" is unconstitutionally vague. What does the term "public morals" refer to? Does it purport to describe conduct which would be decent and moral when done in private but not when done in public; or conduct indecent or immoral, or both, even if private, which outrages the "public" whether done publicly or privately? Furthermore, who constitutes the public?

In the case of *In re Davis,* 242 Cal.App.2d 645, 661, the court said:

> " . . . even a judicial interpretation of 'decency' which would equate that term with *morality would . . . not save the statute.* An Arkansas law prohibited ' . . . any act injurious to the public health, or public morals . . . . ' In *Ex parte Andrew Jackson,* 45 Ark. 158, the Supreme Court of that state said in a case in which the defendant was charged with committing an act 'injurious to

> the public morals: 'We cannot conceive how a crime can, on any sound principle, be defined in so vague a fashion. Criminality depends, under it, upon the moral idiosyncrasies of the individuals who compose the court and jury. The standard of crime would be ever varying, and the courts would constantly be appealed to as the instrument of moral reform, changing with all fluctuations of moral sentiment . . . .'"

Similarly, in *Boretta Enterprises v. Department of Alcoholic Beverage Control*, 75 Cal.Rptr. 79, 98 (1969), the court said that what is contrary to public welfare and morals may be a fit standard for defining the exercise of legislative power. Nevertheless, it gives but a nebulous test for gauging specific human conduct in an adjudicatory proceeding involving the loss of liberty or property. It can only subject the actor to compliance with the whims of those charged with the administration of the laws, on pain of losing his license.

That this Court looks with disfavor on definitions of crime which would leave it to the moral judgment of juries to determine whether or not a crime has, in fact, been committed is demonstrated by *Musser v. Utah*, 333 U.S. 95. In that case the defendant had been convicted under a statute which made it illegal to conspire "to commit acts injurious to public morals . . . ." This Court remanded the case to the Utah Supreme Court, in order to give the court an opportunity to determine what the statute meant. In doing so, this Court said:

> "Standing by itself, it would seem to be warrant for conviction for agreement to do almost any act which a judge and jury might find at the moment contrary

to his or its notions of what was good for health, morals, trade, commerce, justice or order."

## II

## California Business And Professions Code Section 25601, As Applied, Violates The First And Fourteenth Amendments, In That It Unconstitutionally Impresses An Individual Licensee To Infringe His Customers' Guarantees Of Free Speech And Association.

The Department of Alcoholic Beverage Control, acting in pursuance of section 25601 of the Business and Professions Code, forces the licensee, under threat of revocation of his license, to police his establishment in such a manner that it does not become a " . . . place in which people abide or to which people resort . . . for purposes which are injurious to the public morals . . . . " It is clear that, as applied, this requirement subjects the licensee to revocation of his license if his patrons engage in speech, among themselves, *the content of which* offends "public morality."

Setting aside the grave constitutional deficiencies inherent in the vague term "public morality," it is apparent that, as applied, this statute is being used to coerce the licensee into censoring and inhibiting the expression and association among his clients. The effect of the threat of revocation of his license is to compel the licensee to become the arbiter of the permissibility of the content of his patrons' expressions. Furthermore, given that the licensee is subject in strict liability for any infringement of this amorphous "public morality" requirement, he is induced to be all the more inhibitory and officiously

intrusive into the private conversations of his patrons in order to evade the imposition of a penalty by the Alcoholic Beverage Control Board for some unpredictable infraction.

This is a form of state action; *i.e.*, the licensee, as a private individual, is being invested with public functions. The state is, in effect, encouraging if not compelling an unconscionable intrusion into the sphere of free speech. *Marsh v. State of Alabama*, 326 U.S. 501; *Reitman v. Mulkey*, 387 U.S. 364. It is noteworthy that this Court has recently said:

> " . . . When private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the state and subject to its constitutional limitations."
>
> *Evans v. Newton*, 382 U.S. 296, 299;
>
> *Terry v. Adams*, 345 U.S. 461, 469.

Moreover, the type of policing of free expression which the licensee is compelled to assert against his patrons would clearly be unconstitutional if the state attempted to assert, directly, the same control. *Schenck v. United States*, 249 U.S. 47; *Whitney v. California*, 274 U.S. 357; *Chaplinsky v. New Hampshire*, 315 U.S. 568; *Kingsley Int. Pic. Corp. v. Regents*, 360 U.S. 684.

The state must not be permitted to achieve this unconscionable inhibition of free speech by indirection.

## III

## California Business And Professions Code Section 23090.5 Is Unconstitutional, In That It Unreasonably Discriminates Between The Department of Alcoholic Beverage Control And Most

**Other Agencies, In That It Exempts Its Findings Of Fact From Judicial Review.**

Sections 23089 and 23090 of the Business and Professions Code restrict the writ of review only to the appellate court, thereby circumventing the Superior Courts, which, under Article VI, section 10, of the California Constitution:

> " . . . have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition."

The legislature, through the adoption of sections 23089 and 23090, has sought to exempt the Department of Alcoholic Beverage Control from the rigors of a judicial scrutiny by a trial court (and also apparently by the appellate court) as to any questions of fact.

Section 23090.5, in denying jurisdiction to the Superior Court, not only conflicts with Article VI, section 10, of the California Constitution but it is also unconstitutional in that it unreasonably differentiates the Department of Alcoholic Beverage Control from most other administrative agencies, in exempting its findings of fact from judicial review. There seems to be no rational basis for such preferential treatment, and thus, the discrimination thereby engendered bears no reasonable relation to a proper legislative object and is hence unconstitutional.

Although this section withstood an attack as being unconstitutional for vagueness in *Department of Alcoholic Beverage Control v. Superior Court for the County of Orange*, 73 Cal. Rptr. 780, that case constitutes no relevant precedent for the issue raised here; *i.e.*, the unconstitutionality of the section because of a violation of "equal protection" of the laws.

Moreover, under section 23090.3, "[t]he findings and conclusions of the department on questions of fact are conclusive and final and are not subject to review. Such questions of fact shall include ultimate facts and the findings and conclusions of the department."

This section is a transparent attempt to get around the constitutional right to have a court inquire into frivolous findings and sham proceedings unsupported by any true factual basis.

It has been stated that due process of law requires that an administrative determination be based upon substantial and legally competent evidence, and that whether there is such evidence is a question of law. *The Universal Camera Corp. v. NLRB*, 340 U.S. 474; *Bridges v. Wixon*, 326 U.S. 179; *Walker v. San Gabriel*, 20 Cal. 2d 879.

It is submitted that the purpose of the legislation here was to foreclose completely the liquor licensee from meaningful review by the courts and that such a classification as embodied in these sections is invidious and discriminatory and must be stricken down.

## IV

## The Failure Of The Department Of Alcoholic Beverage Control To Meet Any Of The Issues Presented By The Petitioner At His License Revocation Hearing Constituted A Violation Of Due Process, In That It Denied Petitioner His Right To A Fair Hearing.

Under section 11518 of the California Government Code, the decision of an administrative agency "shall be in writing

and shall contain findings of fact, a determination of the issues presented and the penalty, if any."

Section 11501 of the Government Code makes the Department of Alcoholic Beverage Control subject to the requirements of section 11518.

The decision and findings of the hearing officer adopted by the Department of Alcoholic Beverage Control did not meet any of the issues presented by the petitioner and, thus, violated section 11518 of the Government Code in not presenting all of the issues and passing upon them. Specifically, issues were raised by the petitioner at the time of the hearing that the statutes under which he was charged were unconstitutional both on their face and vague as applied. These issues were totally ignored in the findings of the Board.

The failure of the administrative agency deprived petitioner of due process and a fair hearing. To permit an agency to arrive at a determination in the process of which it disregards the issues raised by the party charged would be to condone and sanction a practice that could only be productive of arbitrary and sham decisions by that agency.. This Court has said that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. *Morgan v. United States,* 304 U.S. 1.

Furthermore, on a pragmatic level, such a result would make judicial review of administrative decisions merely perfunctory. It is, after all, a "simple but fundamental rule of administrative law" that the orderly functioning of the process of review "requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." *SEC v. Chenery Corp.,* 332 U.S. 194, 196; *SEC v.*

*Chenery Corp.*, 318 U.S. 80, 94.

As Mr. Justice Cardozo has so appropriately stated:

> "We must know what a decision means before the duty becomes ours to say whether it is right or wrong."
>
> *United States v. Chicago, M., St. P. & P.R.R.*, 294 U.S. 499, 511.

It is submitted that it is impossible for any reviewing court to know what an administrative decision "means," in any just sense, if that agency refused to address itself to the critical and fundamental issues presented by the defendant at the administrative hearing.

## CONCLUSION

For the reasons stated above, this appeal involves serious unresolved constitutional questions which this Court should decide.

Respectfully submitted,

BURTON MARKS, ESQ.

MARKS, SHERMAN and LONDON

*Attorney for Petitioner*

STATE OF CALIFORNIA )
) ss.
County of Orange )

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 315 Third Street, Huntington Beach, California 92646, that on MARCH , 1970, I served the within JURISDICTIONAL STATEMENT (Corlon C. Keller v. The Department of Alcoholic Beverage Control of the State of California) on the following named parties by depositing a copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
1215 "O" STREET
SACRAMENTO, CALIFORNIA [2 COPIES]

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD
1215 "O" STREET
SACRAMENTO, CALIFORNIA

ATTORNEY GENERAL, STATE OF CALIFORNIA
600 STATE BUILDING
LOS ANGELES, CALIFORNIA 90012

I declare under penalty of perjury that the foregoing is true and correct.

Executed on MARCH , 1970, at HUNTINGTON BEACH, CALIFORNIA.

_____
D. A. Standefer

41 COPIES TO SUPREME COURT OF THE UNITED STATES,
WASHINGTON, D. C.

**Dean-Standefer Co., 315 3rd St., Huntington Beach, Calif.**
**(714) 536-7161**